IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.61 OF 2001

1) Mr. Lingu Y. Chodankar (since deceased) through his heirs, namely,

a) Mrs. Aruna Prashod Shirodkar, daughter, major, married, Indian National, resident of C-3, Ground Floor, Rukhmini Apartment, Bablo Naik Colony, St.Inez, Panaji, Goa.

b) Miss Sushma Lingu Chodankar, daughter, major, spinster, Indian National, resident of Salkar Colony, room No.3, Vaddem, Vasco-da-Gama.

c) Mr. Vishwant Lingu Chodankar, son, major, bachelor, Indian National, residnet of Salkar Colony, Room No.3, Vaddem, Vasco-da-Gama,

d) Mr. Deepak Lingu Chodankar, son, major, bachelor, Indian National, resident of Salkar Colony, Room No.3, Vaddem, Vasco-da-Gama,

e) Miss Nilima Lingu Chodankar, daughter, major, spinster, Indian National, resident of Salkar Colony, Room No.3, Vaddem, Vasco-da-Gama.

2) Mrs. Laxmi Lingu Chodankar, widow of the deceased (Appellant No.1) major, Indian National, resident of Salkar Colony, Room No.3, Vaddem, Vasco-da-Gama. .... Appellants.

Vs.

1) Confre de Confraria Da Nossa Senhora dos Merces da Capela de Vaddem, Mormugao, throgh its Constituted Power of Attorney Mrs. Shreekala Fernandes, Proprietress, P & R Developers, having

Office at Yash Building, Ground Floor, Behind Cottage Hospital, Chicalim, Goa.

2) Mr. Yeshwant Kurade, Post Box 190, Margao, Goa. .... Respondents.

Mr. S.G. Dessai, Sr. Advocate with Mr. Mandar Shirodkar, Advocate for the appellants.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr. I. Aga, Advocate for respondent No.1.

CORAM : F.I. REBELLO, J.

DATE : AUGUST 8, 2003.

ORAL JUDGMENT :

The appeal was admitted on the following questions of law :

> Whether the appellants even as trespassers are entitled to the relief of permanent injunction claimed in the suit, since they were being evicted without following the due process of law ?

2. The appellants are the original plaintiffs who had approached the Court for injunction against the respondent No.1, the original defendant No.1, on the ground that the original defendant No.3, now respondent No.1 had inducted the appellant No.1 in the suit premises as a tenant. The case was that there was a lease created by the original defendant No.1 in favour of defendant No.3 who, in turn, handed over the possession to the plaintiff No.1 on lease and with the consent and knowledge of defendant No.1.

Issues were framed, which were as under :

1. Whether the plaintiffs prove that they were inducted as tenants in the suit tenement by the defendant No.3 after giving a due notice to the then Managing Committee of defendant No.1 ?

2. Whether the plaintiffs prove that they have been lawfully using the suit tenement as garage for last 30 years as on the date of filing of the suit ?

3. Whether the plaintiffs prove that they are lawfully in possession and enjoyment of the suit property ?

4. Whether the defendant Nos. 1 and 2 prove that the defendant No.3 did not and could not induct the plaintiffs in the suit premises as tenant in view of the agreement dated 27.1.62 ?

The trial Court answered issues No.1, 2 and 3 as not proved and answered issue No.4 in favour of the defendants as proved.

An appeal came to be preferred, being Regular Civil Appeal No.30/97. The points for consideration as formulated by the first appellate Court, were as under:

1. Whether the plaintiff No.1 has established that he was inducted in the suit premises by the defendant no.3 about 30 years prior to the institution of the suit ?

2. Whether the plaintiff no.1 proves that he was in settled possession of the suit premises till the date of the institution of the suit ?

The learned Addl. District Judge, after examining the evidence on record, held that the plaintiffs had failed to prove that they were inducted in the suit tenement by defendant No.3 and consequently, the plaintiffs have failed to prove that they were in lawful possession of suit tenement. It was further held that the plaintiffs had failed to established they are in possession of the suit tenement since more than 30 years. It was further held that the documentary evidence on record, at the best, may prove that the plaintiff were in possession of the suit tenement at the time of institution of the suit, but the evidence on record further indicates that immediately before institution of the suit, defendants

No.1 and 2 tried to dispossess the plaintiffs from the suit tenement.

3. At the hearing of the appeal, on behalf of the appellants, it is contended that as the appellants were in settled possession, they cannot be dispossessed otherwise than by due process of law. Reliance for that purpose is placed on the Judgments of the learned Single Judge of this Court in **Smt. Sarladevi vs. Shailesh,** A.I.R. 1996 Bombay 98. From that Judgments, it will be clear that the view taken therein was based on the proposition that the appellants before the Court, had been lawfully inducted into the premises and, therefore, could not be evicted otherwise than by due process of law. A similar view has been taken by the Division Bench of Karnataka High Court in **C. Baskar vs. State of Karnataka and another,** 1995 A.I.H.C. 3228. There can be no dispute on that count. A person in possession is entitled to be protected firstly if such person was inducted lawfully and subsequently possession has become unlawful and secondly, where such person is in possession over long period of time, in which case also, even an owner cannot dispossess a person without the due authority of law. This position is settled by the Apex Court in the case of **Prataprai N. Kothari vs. John Braganza,** (1999) 4 SCC 403. In **Krishna Ram Mahale (deceased) by his LRs., vs. Mrs. Shobha Venkat Rao,** A.I.R. 1989 SC 2097 wherein the Apex Court has observed that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing, but this right is not available to the true owner if the trespasser has been successful in

accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies under the law.

4. In the instant case, the appellants are seeking an injunction against the respondents from dispossessing them otherwise than by due process of law. The question is whether the appellants have been able to establish, firstly that they were inducted in the suit premises lawfully and that they were in settled possession. In so far as grant of injunction is concerned, we may refer to the Judgment of the Apex Court in **Premji Ratansey Shah and ors. vs Union of India and ors.** (1994) 5 SCC 547, wherein in a case of injunction against an owner at the instance of a trespasser, the Apex Court has observed as under :

> "It is equally settled law that injunction would not be issued against the true owner. Therefore, the courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners, who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession as against the owner. Pretext of dispute of identity of the land should not be an excuse to claim injunction against true owner."

In the instant case, on facts, it has been held that the appellants have been unable to prove that they were lawfully inducted into the premises. The next aspect is whether the appellants have been able to show that they were in settled possession. Learned Counsel tried to point out that what the Court below had tried to examine, was whether the possession of the appellants was lawful and not how long the appellants were in possession. The evidence it is contended shows that the appellants were in possession for nearly 30 years and in these circumstances, reliefs as prayed for ought to be granted. I have considered the Judgment of the trial Court as well as of the first appellate Court. In so far as the trial Court is concerned, even for answering the issue No.3, it had to first answer whether the appellants were in possession, then only the issue of being in possession lawfully would arise. On consideration of the evidence, the trial Court has held that the appellants were unable to prove the same. The first appellate Court at point No.2 had framed the point for determination whether the appellant No.1 was in settled possession. The first appellate Court has recorded that at the highest, the possession of the appellants would be at the time of filing of the suit. In these circumstances, in my opinion, the appellants have been unable to show their possession as lawful or settled possession over the suit premises for grant of injunction. In the instant case, therefore, appellants having been unable to show that they were lawfully inducted or were in lawful settled possession, injunction sought for cannot be granted.

5. In the light of that, there is no merit in the second appeal, which is accordingly rejected. Stay granted stands vacated.

F.I. REBELLO, J.

ssm.